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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier	:
Power Company 270 MW Coal-Fired	:
Power Plant, Sevier County	:
Project Code: N2529-001	:
DAQE-AN2529001-04	:


In Re: Approval Order – PSD Major	:	
Modification to Add New Unit 3 at	:	
Intermountain Power Generating	:	PROTECTIVE MOTION UNDER
Station, Millard County, Utah	:	UTAH R. CIV. P. 56(f)
Project Code: N0327-010	:	
DAQE-AN0327010-04	:	

The Utah Chapter of the Sierra Club (Sierra Club) respectfully submits this protective motion under Utah R. Civ. P. 56(f), to be considered only in the event the Utah Air Quality Board proposes to convert the motions for judgment on the pleadings filed in these two matters by the Executive Secretary of the Utah Air Quality Board, Sevier Power Company, PacifiCorp, and Intermountain Power Service Corporation into motions for summary judgment. Utah R. Civ. P. 56(f) provides that “[s]hould it appear from the affidavits of a party opposing the motion that [she or] he cannot for reasons stated present by affidavit facts essential to justify [her or] his opposition; the court may refuse the

application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

The basis for this motion is described in the attached Declaration of David H. Becker in Support of Protective Motion under Rule 56(f).

Dated: March 19, 2007



JORO WALKER
DAVID BECKER
Attorneys for Utah Chapter of the
Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March 2007, I caused a copy of the foregoing Protective Motion Under Utah R. Civ. P. 56(f) and the Declaration of David H. Becker in Support of Protective Motion under Rule 56(f) to be emailed to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier :
Power Company 270 MW Coal-Fired :
Power Plant, Sevier County :
Project Code: N2529-001 :
DAQE-AN2529001-04 :

In Re: Approval Order – PSD Major :
Modification to Add New Unit 3 at : DECLARATION OF
Intermountain Power Generating : DAVID H. BECKER IN SUPPORT
Station, Millard County, Utah : OF PROTECTIVE MOTION
Project Code: N0327-010 : UNDER RULE 56(f)
DAQE-AN0327010-04 :

DECLARATION OF DAVID H. BECKER

I, David H. Becker, affirm and state as follows:

1. I am one of the attorneys for petitioner Utah Chapter of the Sierra Club (Sierra Club) in this action.
2. This affidavit presents facts to support Sierra Club's request under Rule 56(f) of the Utah Rules of Civil Procedure for additional time to conduct discovery, only in the event the Utah Air Quality Board proposes to convert the motions for judgment on the pleadings filed in these two matters by the Executive Secretary of the Utah Air Quality Board (Executive

Secretary), Sevier Power Company (SPC), PacifiCorp, and Intermountain Power Service Corporation (IPSC) (collectively, the “Proponents”) into motions for summary judgment.

3. The Proponents have filed motions for judgment on the pleadings with respect to three of Sierra Club’s claims in its Requests for Agency Action asking the Utah Air Quality Board (Board) to review the Executive Secretary’s approval of air quality permits for IPSC’s and SPC’s proposed coal-fired power plants. These motions are properly considered under Utah Rule of Civil Procedure 12(c) and the standards developed by Utah courts for considering such motions, which are described in Sierra Club’s Consolidated Opposition to Motions for Judgment on the Pleadings (Consolidated Opposition).

4. In the event that the Board deems these motions, or any part of these motions, to be for summary judgment, the Sierra Club asks the Board, pursuant to Rule 56(f), for a continuance of the motions until August 3, 2007 (in the SPC matter) and September 5, 2007 (in the IPSC matter) within which to seek discovery and prepare evidence and expert testimony to respond. This request is based on the following:

a. The Proponents have described and presented their motions as “motions for judgment on the pleadings.” On motions for judgment on the pleadings, a reviewing tribunal considers only the complaint, answer, and any other pleadings allowed – in these matters, the pleadings are the Sierra Club’s Requests for Agency Action and the responses.

b. In support of its motion for judgment on the pleadings, IPSC attached three exhibits introducing material outside the pleadings, principally in support of its arguments regarding the adequacy of its coal chemistry data, which Sierra Club challenged in Statement of Reason # 5 in Sierra Club’s Request for Agency Action in the IPSC matter.

c. The Sierra Club cannot present by affidavit facts essential to justify its opposition to Petitioners' motions and will be unable to do so until they have conducted further discovery regarding the allegations in Proponents' factual submissions and motions.

d. Sierra Club has not yet had an opportunity to conduct discovery since the administrative record and time for taking discovery was opened in mid-February, and the parties have been engaged in briefing preliminary dispositive motions. Preliminary witness lists are not due until April 1, 2007 (in the SPC matter) and May 1, 2007 (in the IPSC matter), with expert reports due by June 20, 2007 (in the SPC matter) and July 15, 2007 (in the IPSC matter).

e. The principal claim on which the Proponents have submitted matters outside the pleadings relate to Sierra Club's Statement of Reason # 5 in the IPSC matter. As described more fully in the Consolidated Opposition, Sierra Club claims that IPSC did not provide, and DAQ did not adequately consider, precise coal chemistry data, that DAQ impermissibly eliminated from the final permit a coal percentage blending limit that the agency had included in the draft permit, and that DAQ's decision was arbitrary and capricious and unsupported by substantial evidence.

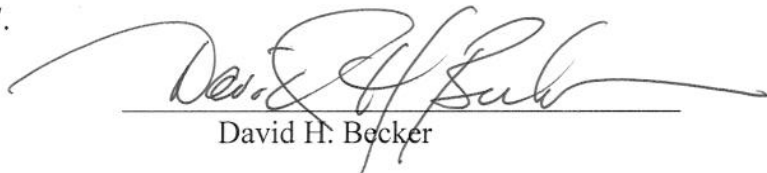
f. The DAQ initially included a requirement for a 20% percentage blending limit in the draft permit for IPSC Unit 3, but removed such a limit from the final permit, replacing it with a 30% limit. The permit preparer, DAQ Engineer Milka Radulovich, and other DAQ personnel, indicated in various documents predating the draft permit that a coal quality or blending requirement was needed to set and ensure compliance with various pollutant limitations. The draft permit authorized a blend of Western bituminous and up to 20% sub-bituminous coal. In a technical memorandum to DAQ, IPSC's consultant described that only Western bituminous coal would be used in Unit 3. Yet in other documents, IPSC proposed to look at a range of coals

including both bituminous and subbituminous. The Sierra Club has not had an opportunity to seek further discovery regarding the significant discrepancies between the different submissions by the applicant, or into the change of direction by the agency from the draft permit to the final permit. In particular, Sierra Club has not yet had the opportunity to request production of documents from DAQ or IPSC or take the deposition of Milka M. Radulovich, DAQ Engineer, who prepared the draft and final permits, to explore the reasons for the DAQ's change of direction regarding the proper inclusion of a coal quality/blending percentage limit in the IPSC Unit 3 permit.

g. Other matters that are raised in the Motions for Judgment on the Pleadings are not currently the subject of submissions outside the pleadings. However, I reserve the right to supplement this affidavit to address any materials or attachments which any of the Proponents may submit together with the reply briefs due in these matters on March 26, 2007, and Sierra Club requests that the Board continue any motion for summary judgment based on such attachments until the August and September 2007 post-discovery motions period to allow an orderly discovery process and reasonable time for the Sierra Club to respond to such motions.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 19th day of March, 2007.



David H. Becker